

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>AMERICAN FEDERATION OF STATE, COUNTY,</b>	:	
<b>AND MUNICIPAL EMPLOYEES, COUNCIL 81,</b>	:	
<b>Local 3911, AFL-CIO,</b>	:	
	:	<b>ULP No. 14-10-977</b>
Charging Party,	:	
	:	<b>PROBABLE CAUSE DETERMINATION</b>
<b>v.</b>	:	<b>&amp; ORDER OF DEFERRAL</b>
	:	
<b>NEW CASTLE COUNTY, DELAWARE,</b>	:	
	:	
Respondent.	:	

**APPEARANCES**

*Lance Geren, Esq., Freedman & Lorry PC, for AFSCME*

*Laura T. Hay, Esq., New Castle County Law Department*

**BACKGROUND**

New Castle County, Delaware (County) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (PERA).

The American Federation of State, County and Municipal Employees, Council 81 (AFSCME), is an employee organization within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 3911, AFSCME is an exclusive bargaining representative, within the meaning of 19 Del.C. §1302(j). AFSCME Local 3911 represents the bargaining unit of County employees which includes all Emergency Services personnel. *DOL Case 302.*

The County and AFSCME are parties to a collective bargaining agreement for this bargaining unit which has a term of July 1, 2013 through June 30, 2015.

On October 6, 2014, AFSCME filed an unfair labor practice charge with the Public

Employment Relations Board (PERB) alleging conduct by the County in violation of 19 Del.C. §1307 (a)(5) and (a)(6), which state:

- (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:
  - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject;
  - (6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

AFSCME alleges the County violated its obligations under the PERA by unilaterally implementing changes to Policy 362, Emergency Medical Services Career Development Plan, without providing AFSCME 3911 the opportunity to bargain concerning those changes and/or their effects on bargaining unit employees. AFSCME also asserts the County unilaterally changed its existing General Order 122, Soft Body Armor, to require paramedics to wear ballistic vests any time they are on duty, rather than only “in areas in which they are exposed to real and imminently dangerous situations”. This change was made on or about July 3, 2014, and AFSCME alleges the County failed to provide notice and/or the opportunity to bargain concerning this change or its impact on bargaining unit employees. In response to AFSCME’s request that the County rescind the changes and enter into bargaining with AFSCME, the County declined to do so. AFSCME alleges both the change to the career development plan and the change to the soft body armor policy involve mandatory subjects of bargaining about which the County is obligated to bargain under the PERA.

On October 15, 2014, the County filed its Answer to the Charge, denying the conclusions and assertions that it had violated the PERA. The County included in its Answer New Matter asserting the Charge failed to state a claim upon which relief may be granted and that, because both issues are the subject of currently pending grievances, the Charge is subject to dismissal or stay because it involves a matter of contractual interpretation.

AFSCME filed its response to the County's New Matter on October 23, 2014, in which it denied the factual and legal positions set forth therein.

This probable cause determination is based upon a review of the pleadings submitted in this matter.

### **DISCUSSION**

Regulation 5.6 of the Rules of the Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
- (b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of determining whether probable cause exists to support an unfair labor practice charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence. *Flowers v. DART/DTC*, ULP 04-10-453, V PERB 3179, 3182 (DE.PERB, 2004).

The County admits in its Answer to the Charge that it implemented changes to both Policy 362 and General Order 122, as alleged, and that AFSCME Local 3911 was "not afforded an opportunity to bargain over the changes ... or the effects of the changes on the bargaining unit employees." Charge ¶¶8, 9, 11, 12; Answer ¶¶8, 9, 11, 12. Considered in a light most favorable to the Charging Party, the pleadings are sufficient to establish the County may have violated 19 Del.C. §1307(a)(5) and/or (a)(6), as alleged.

Having so determined, the County's assertion that the pleadings fail to state a claim for relief under the PERA is denied.

The 2013-2015 collective bargaining agreement between these parties includes a provision which specifically addresses changes in County Policies and Rules:

- (112) The Union agrees the County has complete authority over the policies and administration of all County departments, which it exercises under the provisions of law and in fulfilling establishment of rules and regulations not inconsistent with the terms of this Agreement. Any matter involving the management of governmental operations vested by law in the County, and not covered by this Agreement, is the province of the County. Should the Union object to any rule or regulation as being violative of this Agreement, it may resort to the grievance procedure outlined in Paragraph 11. The County shall send a copy of any new departmental or County wide employer-employee relations policies affecting the Union or its members to the President of Local 3911.

This Board has held that where resolution of alleged statutory violations directly relate to a contractual issue which is subject to resolution through the parties' negotiated grievance and arbitration procedure, PERB may invoke a discretionary, limited deferral policy:

When parties have contractually committed themselves to agreeable procedures for resolving contractual disputes, it is prudent and reasonable for this Board to afford those procedures the full opportunity to function. *Fraternal Order of Police Lodge No. 1 v. City of Wilmington*, ULP 89-08-040, I PERB 449 (PERB, 1989), citing *Collyer Insulated Wire*, NLRB, 129 NLRB 837 (1971); *FOP Lodge 1 v. City of Wilmington*, ULP 10-11-773, VII PERB 4935 (2011).

The negotiated agreement includes a grievance procedure that culminates in the submission of unresolved issues to final and binding arbitration before an impartial arbitrator. AFSCME admits it filed a grievance relating to the revisions of Policy 362, which cites sections of the collective bargaining agreement it asserts the County has violated. AFSCME also admits it filed a grievance relating to changes in the body armor policy. *AFSCME Response to County's New Matter*, ¶3, 4.

PERB's deferral policy is not, however, unconditional. The contractual issue considered by the arbitrator must be factually parallel to the unfair labor practice issue raised before the

PERB and the arbitrator must be presented generally with the facts relevant to resolving the unfair labor practice charge. In order to defer to resolution through the arbitration procedure, the contractual issue which underlies the unfair labor practice charge must be submitted for determination.

Deferral to arbitration does not constitute a final resolution of the pending unfair labor practice charge nor deprive PERB of jurisdiction or responsibility to resolve the charge. Where deferral is ordered, the PERB retains jurisdiction over the unfair labor practice charge for the express purpose of reconsidering the matter upon application of either party for any of the following reasons:

- 1) that the arbitration award failed to resolve the statutory claim;
- 2) that the arbitration has resulted in an award which is repugnant to the applicable statute;
- 3) that the arbitral process has been unfair; and/or
- 4) that the dispute is not being resolved by arbitration with reasonable promptness.

Because a determination of whether the County violated its obligations under the PERA relates to a contractual provision of the collective bargaining agreement, this matter is deferred to the parties' negotiated grievance and arbitration procedure. It is noted that resolution of the underlying grievances may not resolve this unfair labor practice charge, which asserts the County has implemented changes to mandatory subjects of bargaining. The County is required under the PERA to negotiate with AFSCME with respect to terms and conditions of employment. It is possible that after the culmination of the grievance procedure, this charge may continue, should AFSCME conclude the award does not resolve the statutory dispute. This possibility does not, however, prohibit these parties from employing their negotiated contractual procedures in order to resolve this dispute.

Further processing of this Charge is stayed pending the exhaustion of the contractual procedure.

## DECISION

Considered in a light most favorable to AFSCME, the pleadings are sufficient to establish that the County may have violated 19 Del.C. §1307 (a)(5), and/or (a)(6), as alleged.

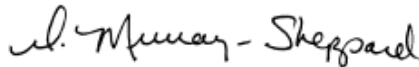
Because the resolution of the allegations of this Charge turns on application of the parties' collective bargaining agreement, the Charge is deferred to the negotiated grievance and arbitration procedure.

PERB retains jurisdiction over the Charge that the County has violated its duty to bargain in good faith by unilaterally implementing a change to a mandatory subject of bargaining for the express purpose of reconsidering the matter, on application by either party, for any of the following reasons:

- 1) that the arbitration award failed to resolve the statutory claim;
- 2) that the arbitration has resulted in an award which is repugnant to the applicable statute;
- 3) that the arbitral process has been unfair; and/or
- 4) that the dispute is not being resolved by arbitration with reasonable promptness.

The parties are directed to notify the Public Employment Relations Board within sixty (60) days from the date of this decision as to the status of the arbitration of the underlying grievances.

DATE: February 20, 2015



DEBORAH L. MURRAY-SHEPPARD  
Executive Director  
Del. Public Employment Relations Bd.